

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY SMITH, Personal Representative of
the Estate of EDDIE PEARL SMITH, Deceased,

UNPUBLISHED
April 15, 2003

Plaintiff-Appellant,

v

No. 235328
Wayne Circuit Court
LC No. 98-836027-NH

ST. JOHN HEALTH SYSTEM – DETROIT –
MACOMB CAMPUS, f/k/a DETROIT-
MACOMB HOSPITAL CORPORATION, d/b/a
DETROIT RIVERVIEW HOSPITAL,

Defendant-Appellee,

and

PAULA JONES, M.D., JACOB E. WHITE,
JACOB E. WHITE, M.D., P.C., JOHN W.
SEALEY, and LESLIE W. SMITH,

Defendants.

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order approving settlement. We affirm.

Plaintiff's decedent, a seventy year old woman, entered Detroit Riverview Hospital (defendant) for hernia repair surgery and died two days later.¹ Following a settlement conference, the parties agreed to settle the claim. However, the settlement was not immediately placed on the record. Defense counsel sent a release and settlement to plaintiff's counsel, setting forth the procedure on how the settlement check would be prepared in light of the representation by plaintiff's counsel that it was unnecessary to include the federal lien claimant on the check. On two occasions, plaintiff's counsel sent correspondence to delay the hearing to place the

¹ All other individually named defendants were dismissed from the litigation in the trial court and are not parties to this appeal.

settlement on the record. In reliance on the agreement to settle, defendant's experts were notified that any file materials could be destroyed and testimony at trial was unnecessary. Additionally, defendant was not notified of or present for the deposition of plaintiff's expert in the continuing litigation against a former codefendant doctor. After a period of inactivity and notice of a trial date, defendant moved to adjourn trial and to enforce the settlement agreement. In response, plaintiff acknowledged tentative discussions regarding settlement, but alleged that the "conditions necessary to the creation of a binding settlement agreement had never been reached."² Additionally, plaintiff asserted that initiation of a settlement could only occur by proper motion filed by the personal representative, requesting leave of the court to settle the claim, followed by a court hearing determining the best interests of the estate. Plaintiff's counsel also expressed concern about the impact of the government lien on the settlement amount. On motion by defendant, the trial court granted the motion to enforce the settlement and denied plaintiff's request to amend the complaint to raise new allegations against defendant.

Plaintiff alleges that the trial court must hold a "meaningful hearing" as a precondition to enforcement of a proposed settlement in a wrongful death action only at the request of the personal representative. We disagree. Issues of statutory construction present questions of law and receive review de novo. *Haliw v Sterling Heights*, 464 Mich 297, 303; 627 NW2d 581 (2001). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This determination is accomplished by reviewing the plain language of the statute itself. *Id.* When a statutory term is not defined, it is construed in accordance with its ordinary and generally accepted meaning. *Oakland County Bd of County Rd Comm'rs v Michigan Prop & Gas Guar Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). Dictionary definitions may be consulted for terms that are not expressly defined by statute. *Id.*

MCL 600.2922(5) governs the procedure for settlement of a wrongful death claim:

If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

A proviso restricts the operative effect of statutory language to less than what its scope of operation would be otherwise. 2A Singer, Sutherland Statutory Construction (6th Ed), § 47:08, p 235-236. Provisos are interpreted in accordance with the general rules of statutory construction. *Id.* Review of the statute at issue reveals that "if" a motion was filed before the court in which the action was pending, the court shall hold a hearing. "If" is defined as "in the event that," "granting that," or "on condition that." The American Heritage Dictionary (2d College Ed), p 654. The term "shall" denotes mandatory rather than discretionary action. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). Thus, the court is required to hold a hearing when the issue is raised before the court by motion. MCL 600.2922(5). However, the

² The contractual arguments raised in the circuit court have not been raised on appeal and need not be addressed. See *Kirkaldy v Rim*, 251 Mich App 570, 584; 651 NW2d 80 (2002).

plain language of the statute does not foreclose the opposing party from seeking enforcement of a settlement through governing contractual principles. *In re MCI, supra*; See *Hisaw v Hayes*, 133 Mich App 639, 642; 350 NW2d 302 (1984). Accordingly, the trial court properly addressed the propriety of settlement of the action in response to the motion filed by defendant.³

Plaintiff alleged that a “meaningful hearing” is required. We note that there was a substantial period of time between the hearing on the motion to enforce the settlement⁴ and the hearing on the motion to approve the settlement.⁵ There is no indication that plaintiff requested the opportunity to present witnesses or proofs to demonstrate the deficiency of the settlement. Plaintiff’s counsel merely cited to the affidavit of merit filed in the litigation. Consequently, the challenge to the sufficiency of the hearing is not preserved for appellate review. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000).

Plaintiff next alleges that the trial court erred in failing to permit amendment of the complaint to allege a new theory of liability. We disagree. The trial court’s decision to enter a settlement agreement is reviewed for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). The decision regarding amendment of a complaint is also reviewed for an abuse of discretion. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 405; 605 NW2d 690 (1999). Amendments are ordinarily granted, but should be denied when the opposing party will be unduly prejudiced by the amendment. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Prejudice may be found when the moving party, after the close of discovery and just prior to trial, seeks to add a new claim on the basis of the same set of facts without reasonable notice to the opposing party. *Id.* at 659.

Plaintiff’s amended affidavit of merit was based on the same set of facts. Plaintiff did not give defendant notice of discovery depositions based on the agreement to settle. According to the lower court docket entries, a trial date had been set. Defendant had notified its experts that materials could be discarded in light of the settlement. Under the circumstances, the trial court did not abuse its discretion by denying the motion to amend. *Weymers, supra*; *Backus, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

³ We need not address MCL 700.3924, in effect, the probate counterpart to the wrongful death statute at issue, because this litigation was filed in circuit court, and we do not render advisory opinions.

⁴ This motion was heard in conjunction with Dr. White’s motion for summary disposition and a motion to adjourn trial. The hearing was held on November 10, 2000.

⁵ The hearing on this motion occurred on March 9, 2001.